IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-6852

WILLIE JAMES WILSON, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED

I.

Whether the Georgia Supreme Court's affirmance of petitioner's death sentences in accordance with the court's pyramid interpretation of Georgia's capital sentencing scheme violates the fundamental principles of Furman v. Georgia and Stromberg v. California where the jury expressly relied upon an invalid aggravating circumstance in its decision to impose the death sentence.

II.

Whether Georgia's failure to explain the meaning, role, or significance of mitigating evidence in the sentencing instructions in a capital case--in contrast to the approach of all but one other state--provides sufficient guidance to a jury considering imposition of the death penalty.

III.

Whether the gross misconduct of petitioner's trial counsel, in effect pleading his client guilty during closing arguments (notwithstanding petitioner's trial testimony which, if believed, would have required conviction for noncapital offenses, and notwithstanding instructions to the jury by the trial court, based on petitioner's testimony, authorizing findings of voluntary manslaughter and self-defense) constitutes a plain error that renders petitioner's trial as a whole fundamentally unfair.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner, Willie James Wilson, Jr., respectfully prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Georgia, entered on the 1st day of March, 1983.

OPINION BELOW

The opinion of the Georgia Supreme Court (App. A) is reported at 250 GA. 630, 300 S.E.2d 640.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on March 1, 1983. There was no petition for rehearing. Petitioner requested by motion an extension of time in which to file this Petition, and Justice Powell, on March 28, 1983, signed an order extending petitioner's time to file this Petition to and including May 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

Ga. Code Ann. §§ 17-10-30
17-10-35(c)(1)
27-2537

STATEMENT OF THE CASE

Petitioner Willie James Wilson, Jr., a black U.S. Army private stationed at Fort Stewart in Hinesville, Georgia, left his base and travelled to the predominantly white, rural community of Bristol, Georgia. In Bristol he was involved in the shooting of two well-known local residents, Alfred Boatright and Morris Highsmith. Petitioner subsequently was indicted on two counts of malice murder and one count of armed robbery.

Petitioner plead not guilty to the charges and exercised his right to have a jury determine his guilt or innocence. (Arraignment, 8/24/81, pp. 16-19) Despite the fact that the vast majority of the prospective jurors knew or knew of the victims or their families or were familiar with the facts of the case, petitioner's motion for a change of venue was denied. (tr. 1354-55)

At trial, the prosecution introduced evidence to show that petitioner planned to commit an armed robbery and that he killed the two men while robbing a small convenience store. Petitioner admitted firing the fatal shots and taking the money from the store, (Tr. 2161-62, 2365-66, 2424-32) but repeatedly denied that either the shooting or the taking was planned. (Tr. 2160-62, 2369, 2383-84, 2432) He maintained instead, both in a statement made to arresting officers and on direct and cross examination at trial, that the shooting grew out of a heated argument with the two attendants in the store that arose when he attempted to offer his pistol in exchange for gasoline. (Tr. 2160-61, 2364-66, 2423-24) During the argument petitioner was subjected to obscene language and derogatory racial epithets. (Tr. 2161, 2364-66, 2423)

Petitioner steadfastly maintained that it was only after this argument, and after he saw one of the two men bend down

behind the counter as if reaching for a weapon, that he fired his own gun to protect himself. (Tr. 2161, 2364-66, 2423-25) Petitioner admitted taking the money as an afterthought when he saw it lying in an open cash register after the shooting. (Tr. 2162, 2366-69, 2432)

Because of the gross misconduct of petitioner's trial counsel, the jury was never given an opportunity to consider petitioner's version of the case. Initially, counsel impliedly conceded petitioner's guilt during voir dire (Tr. 382, 451) and in his opening statement, (Tr. 1434-38) and then, incredibly, expressly instructed the jury to find petitioner guilty on both murder charges at the conclusion of his closing argument. (Tr. 2577) This concession of guilt was made notwithstanding petitioner's exculpatory testimony (supported by appropriate charges by the court to the jury on the lesser included offense of manslaughter (Tr. 2593) and the defense of self-defense). (Tr. 2591) Counsel's closing remarks left no doubt as to his own position and had the effect of pleading his client guilty:

> Ladies and gentlemen of the jury, you accept your responsibility. Find him guilty of count one and two [the murder counts]. But if you accept your responsibility on count three of the robbery of Alfred Boatright -- I took his life but I took nothing from him -- have to find him not guilty on that.

(Tr. 2577) (See Appendix G for counsel's entire closing argument.) Predictably, the jury returned a verdict of guilty on the two murder counts. (Tr. 2607)

The jury, having reached its verdict at 7:30 p.m. on Friday, February 5, was reconvened at 9:00 a.m. the next morning, Saturday, February 6, 1982, for the death penalty hearing. (Tr. 2621) The purpose of the hearing was to provide both the prosecution and defense with an opportunity to present additional evidence relevant to sentencing, so that the jury would be guided in its sentencing deliberations.

Prior to the presentation of evidence in aggravation and mitigation of punishment, the trial court convened a bench conference as required by the Georgia Unified Appeal Procedure. (Ga. Code § 17-10-36(b) and rules promulgated thereunder by the Georgia Supreme Court) (Tr. 2621) Petitioner's trial counsel objected to the trial court's proposed sentencing instructions on aggravating circumstances because the instructions would allow the jury to use each of the two murders in mutual aggravation of the other. (Tr. 2638) The objection was overruled and the proposed instructions were left unmodified. (Tr. 2650) The trial court ruled that even if the instructions to the sentencing jury were not proper the impropriety in the jury's finding of aggravating circumstances would be irrelevant if the jury found at least one "proper" statutory aggravating circumstance. (Tr. 2651)

At the sentencing hearing the prosecution argued for the death penalty, relying upon all of the evidence introduced at the guilt/innocence phase of the trial and petitioner's prior criminal record (one burglary at age 17 and other traffic and related offenses). (Tr. 2658, 2693-97)

Petitioner then offered, for purposes of mitigation, testimony from his father, (Tr. 2664-70) his mother, (Tr. 2671-75) his aunt, (Tr. 2676-82) and his former spouse, (Tr. 2682-89) each of whom stated petitioner was not a violent person. Each of these witnesses expressed a strong concern for petitioner's well-being and a desire that he not receive the death penalty. Petitioner also testified at the sentencing hearing. (Tr. 2689-2702) He expressed remorse about the deaths and briefly discussed his Army service and awards he received at Fort Benning, Georgia. (Tr. 2690-91)

Following the closing arguments of counsel, the trial court instructed the jury on the criteria for imposing the death penalty. (Tr. 2787-95) (See Appendix B) The court explained

both in oral and written instructions the use and categories of aggravating circumstances. (Tr. 2789-95) A significant portion of the charge concentrated on the instruction that resulted in simultaneous consideration of each murder in aggravation of the other. (Tr. 2789-91)

In contrast, the court failed to define or in any way explain the role of mitigating circumstances. The trial court merely repeated the following litany several times:

> [You shall consider] all of the evidence, facts and circumstances of this case which have appeared at both the guilt-innocence phase and the pre-sentencing phase of the trial in this case, including any and all evidence, facts and circumstances in extenuation, mitigation and aggravation of punishment.

(Tr. 2788-89, 2792, 2793, 2794)

The jury returned a sentence of death on both counts of murder. (Tr. 2801-03) (See Appendix C) The jury found two statutory aggravating circumstances: 1) that each murder was committed while the defendant was engaged in the commission of another capital felony (the other murder) and 2) that each murder was committed while the defendant was engaged in the commission of another capital felony (the armed robbery). (Tr. 2802-03)

The Georgia Supreme Court affirmed the death sentences notwithstanding its finding that the sentencing instructions improperly permitted the jury to consider the two murders as mutually supporting aggravating circumstances. See Wilson v. Georgia, 250 Ga. 630, 300 S.E.2d 640 (1983). The court held that at least one remaining statutory aggravating circumstance would suffice to support the death sentences. 250 Ga. at ____, 300 S.E.2d at ____. (See Appendix A)

All of the questions of sentencing presented in this case were necessarily reviewed by the Georgia Supreme Court under Ga. Code § 17-10-35(c)(1), which calls for a mandatory review

of "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor...." The Georgia court has interpreted this provision as requiring a broad consideration of the aggravating circumstances found by the jury and the evidence concerning the crime and the defendant. See Tucker v. Georgia, 244 Ga. 721, 261 S.E.2d 635 (1979). In addition, petitioner's counsel specifically objected at trial to the sentencing instructions that allowed the jury to consider the two murders as mutually aggravating. (Tr. 2638) The Georgia Supreme Court expressly considered and decided that question in its opinion. 250 Ga. at ____, 300 S.E.2d at ____. Also, at a pre-trial hearing on September 3, 1981 where the trial court heard defense objections to the discretion granted to the jury under the Georgia death-penalty scheme, counsel specifically relied upon the eighth and fourteenth amendments and Furman v. Georgia.

I.

THE GEORGIA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S DEATH SENTENCES IN ACCORDANCE WITH THE COURT'S PYRAMID INTERPRETATION OF GEORGIA'S CAPITAL SENTENCING SCHEME VIOLATES THE FUNDAMENTAL PRINCIPLES OF FURMAN V. GEORGIA AND STROMBERG V. CALIFORNIA WHERE THE JURY EXPRESSLY RELIED UPON AN INVALID AGGRAVATING CIRCUMSTANCE IN ITS DECISION TO IMPOSE THE DEATH SENTENCE.

The trial court erroneously authorized the jury to base a sentence of death upon an invalid aggravating circumstance. On review, the Georgia Supreme Court set aside the invalid aggravating circumstance but affirmed petitioner's death sentences. It held that "[s]ince at least one statutory aggravating circumstance remains to support each sentence of death, the elimination of one such circumstance does not require reversal of either sentence." 250 Ga. 630, 638, 300 S.E.2d 640, 648 (1983). As this Court has already recognized by granting certiorari in Stephens v. Zant, ____ U.S. ____, 102 S.Ct. 1856 (1982), the Georgia Supreme Court's routine affirmance of death sentences in

such cases raises serious questions as to the constitutionality and application of the Georgia death-penalty statute. Central principles of this Court's eighth amendment jurisprudence clearly require that petitioner be resentenced by a properly instructed jury.

A. The Georgia Supreme Court's articulation of the "state-law premises" that underlie Georgia's capital sentencing scheme renders that scheme inconsistent with the principles announced in Furman v. Georgia.

The Georgia Supreme Court, in response to a question certified to it by this Court in Stephens, ____ U.S. ____, 102 S.Ct. 1856 (1982), recently announced the state-law premises underlying Georgia's capital sentencing scheme. Zant v. Stephens, 250 Ga. 97, 99-100, 297 S.E.2d 1, 3-4 (1982). Even if petitioner's jury had been instructed in accordance with the Georgia Supreme Court's novel interpretation of the state death penalty statute, petitioner's death sentences must be vacated; the state court's pyramid sentencing scheme is inconsistent with the principles articulated in Furman v. Georgia, 408 U.S. 238 (1972).

In Gregg v. Georgia, 428 U.S. 153 (1976), this Court upheld the Georgia death penalty statute because the standards and procedures set forth therein promised to alleviate the concern of Furman that the death penalty not be imposed in an arbitrary or capricious manner. This Court relied heavily on the assumption that the statute's designation of specific aggravating circumstances would ensure that the jury be both "apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." 428 U.S. at 195 (Opinion of Justices Stewart, Powell, and Stevens). In short, a sentencing procedure setting forth specific aggravating circumstances would guide the jury's discretion in determining whether to impose the death penalty.

Nevertheless, this Court recognized that the constitutionality of Georgia's death sentences ultimately would depend on the state supreme court construing the statute and reviewing capital sentences consistently with the Furman requirements. The Georgia Supreme Court has failed to do so.

The Georgia Supreme Court's recent interpretation of Georgia's sentencing scheme assigned statutory aggravating circumstances a role fundamentally different from that perceived by this Court in Gregg. Zant, 250 Ga. at 99-100, 297 S.E.2d at 3-4. According to the Georgia Supreme Court, the state law governing homicide may be "envisioned as contained within a pyramid." Id. There are three "planes" of the pyramid between the base and the apex, with the consequences to the defendant increasing in severity as the cases proceed from the base to the apex. The first plane separates "from all homicide cases those which fall into the category of murder," and is "established by the Legislature in statutes defining such terms as murder, voluntary manslaughter, and justifiable homicide." Id. In determining whether a case falls above or below the plane, the trier of fact is limited to finding facts. Id.

The second plane "separates from all murder cases those in which the penalty of death is a possible punishment. This plane is established by statutory definitions of aggravating circumstances." Id. at 100, 297 S.E.2d at 4. The jury's function with respect to this plane is limited to finding at least one statutory aggravating circumstance. "A case may not pass the second plane into that area in which the death penalty is authorized [the third plane] unless at least one aggravating circumstance is found. However, this plane is passed regardless of the number of statutory aggravating circumstances found, so long as there is at least one." Id. Indeed, the jury, exercising absolute discretion, is free to impose a life sentence or a death sentence for any reason, or for no reason at all. Thus,

contrary to this Court's assumption in Gregg, whether a defendant lives or dies under the Georgia sentencing scheme is decided in accordance with the "virtually unthinkable" procedure of allowing the jury absolute discretion unguided and unchannelled by any legislative standards. See Gregg, 428 U.S. at 192-93.

The absence of legislative guidance at the life-or-death plane of the Georgia "pyramid" sentencing scheme is clearly inconsistent with the requirements of Furman. In essence, the "pyramid" sentencing scheme merely narrows the class of murder cases to which juries apply absolute discretion in determining the defendant's sentence. Whereas Georgia's pre-Furman capital sentencing scheme conferred absolute discretion on juries in all murder cases, the post-Furman "pyramid" scheme still confers such discretion although only in cases in which at least one statutory aggravating circumstance exists. This Court, however, has recognized that merely narrowing the class of cases in which the death penalty may be imposed does not alleviate federal constitutional concern about sentencing procedures. See Roberts v. Louisiana, 428 U.S. 325 (1976). Consequently, even assuming Wilson's jury adhered to the Georgia Supreme Court's ex-post facto interpretation of the Georgia sentencing scheme, the "pyramid" scheme provides "...standards so vague that they ... fail adequately to channel the sentencing patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found in Furman could occur." Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

In Gregg this Court also relied on "... the further safeguard of meaningful appellate review ... to ensure that death sentences are not imposed capriciously or in a freakish manner" in approving the Georgia sentencing scheme. 428 U.S. at 195; See id. at 222-24 (White, J., concurring). This Court concluded that "meaningful appellate review" was guaranteed by the requirement that the jury "specify the factors it relied upon in reach-

ing its decision,": to wit, the statutory aggravating circumstances that the jury found to exist. See id. at 195. The Georgia Supreme Court's incredible announcement that statutory aggravating circumstances play absolutely no role in the jury's sentencing determination, however, effectively destroys "meaningful appellate review" by that court. The Georgia Supreme Court's review of the jury's "third plane" decision consists solely of a perfunctory check to determine whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. Because Wilson's jury did not "specify the factors it relied upon in reaching its decision," the Georgia Supreme Court could not know, and therefore did not review, the reasons for the imposition of the death penalty, if indeed there were any reasons. Id. Hence, appellate review under Georgia's "pyramid" sentencing scheme cannot guarantee that the death sentence will not be freakishly or capriciously imposed.

B. The Georgia Court's decision affirming petitioner's death sentences conflicts with the Fifth Circuit decision in Stephens v. Zant holding that a death sentence based partly on an invalid aggravating circumstance is unconstitutional under Stromberg v. California; this Court has granted certiorari in Stephens to resolve this substantial federal question.

The Georgia Supreme Court's affirmance of petitioner's death sentences on the ground that one valid aggravating circumstance remained is patently contrary to the well-settled principle that a court must not speculate whether a particular jury would have reached the same conclusion absent an unconstitutional instruction. See Stromberg v. California, 283 U.S. 359 (1931). If the jury is instructed to consider several grounds for conviction, one of which subsequently proves to be unconstitutional, and the reviewing court is unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside. Id. The court must

reverse a conviction if it "could have been based upon both [the unconstitutional] ... and [the constitutional ground] ... [because of the] unacceptable danger that the trier of fact will have regarded the two [grounds] ... as 'intertwined' and have rested the conviction on both together." Street v. New York, 394 U.S. 576, 587 (1969). This fundamental principle of due process applies with equal force to both the guilt-innocence phase and sentencing phase in all capital cases. Presnell v. Georgia, 439 U.S. 14, 16 (1978).

In Stephens v. Zant, on certification from the Supreme Court of the United States, the Georgia Supreme Court set forth the state-law premises underlying Georgia's capital sentencing scheme. Zant, 250 Ga. 97, 297 S.E.2d 1. The court explained that statutory aggravating circumstances simply play no role in the jury's final sentencing deliberations. Id. at 99-100, 297 S.E.2d at 3-4. Assuming arguendo that Georgia's novel interpretation of its capital sentencing scheme is constitutional, the trial judge in the instant case never informed the jury of the limited sentencing role of statutory aggravating circumstances. Accordingly, petitioner is "entitled to have the validity of [his sentence] ... appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Cole v. Arkansas, 332 U.S. 196, 202 (1948); accord Presnell v. Georgia, 439 U.S. at 16.

The trial judge's charge to the jury repeatedly emphasized the importance of the statutory aggravating circumstances in the jury's sentencing deliberations. Indeed, the judge not only submitted the relevant aggravating circumstances to the jury in writing for use in its deliberations, but also required the jury to record each aggravating circumstance it found to exist beyond a reasonable doubt. The jury instructions provided absolutely no indication that, after carefully considering each statutory aggravating circumstance submitted by the trial judge, the jury

should, or even could, discard this list of officially sanctioned grounds for imposing the death penalty in deciding whether to actually sentence petitioner to death. The Fifth Circuit in Stephens held that such erroneous instructions create an unacceptable risk that a jury may rely upon an invalid ground during sentencing deliberations. Accordingly, the court vacated Stephen's death sentence and remanded the case for resentencing by a properly instructed jury. See 631 F.2d 397 (5th Cir. 1980).

Given that petitioner's jury may have attached great significance to the statutory aggravating circumstances in its sentencing deliberations, the jury may well have relied, at least in part, on the invalid aggravating circumstance in its decision to impose the death sentence. Moreover, because a death sentence is not mandatory under Georgia law upon the finding of a valid aggravating circumstance, [i]t is possible that even if the jurors believed that the other aggravating [circumstance was] established, they would not have recommended the death penalty but for" their partial reliance on the "invalid ground." Id. at 414.

II.

GEORGIA'S FAILURE TO OFFER THE JURY ANY GUIDANCE IN THEIR CONSIDERATION OF MITIGATING CIRCUMSTANCES RETURNS THE STATE TO THE ERA OF UNGUIDED DISCRETION THAT EXISTED BEFORE FURMAN V. GEORGIA.

The unbridled discretion accorded the jury in death-penalty cases also taints Georgia's approach to mitigating circumstances. This Court should grant certiorari on this issue for two reasons. First, the Georgia courts' narrow interpretation of their role in instructing the jury on mitigating circumstances raises a substantial issue regarding the precise scope of the trial court's duty in instructing the jury on the role and significance of mitigating circumstances in death-penalty cases. Second,

review is necessary to resolve a conflict between the Georgia Supreme Court and the federal courts of appeals.

A. This case poses substantial and novel issues regarding trial courts' duty to instruct and guide the jury in its use of mitigating circumstances.

In his jury instructions on sentencing, the trial judge limited his discussion of mitigating evidence to several reiterations of the following passage:

> In reaching that determination [of life or death] you shall consider all of the evidence, facts and circumstances of the case which have appeared at both the guilt-innocence phase and at the pre-sentence phase of the trial of this case, including any and all evidence in extenuation, mitigation, and aggravation of punishment.

(Tr. 2788-89) This charge contravenes the principles that this Court has articulated in decisions subsequent to Furman v. Georgia, 408 U.S. 238 (1972). These decisions suggest at least two constitutional prerequisites to the imposition of the death penalty. First, the court must provide the jury with sufficient guidance with which to render a reliable sentence. See Furman v. Georgia, 408 U.S. 238 (1972); Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Cal. L. Rev. 317 (1981). Godfrey v. Georgia, 446 U.S. 420 (1980), most clearly articulates this requirement. In Godfrey, the Court held that the Georgia Supreme Court's interpretation of one of its statutory aggravating circumstances was so vague that the jury lacked meaningful guidance. Id. at 433.

Second, the sentencing authority must be able to consider all relevant evidence in mitigation. Thus, in Woodson v. North Carolina, 428 U.S. 280 (1976), and Lockett v. Ohio, 438 U.S. 586 (1978), the Court struck down state laws that required imposition of the death penalty under specified circumstances and limited

consideration of mitigating circumstances. The Lockett plurality noted that the eighth and fourteenth amendments require that the sentencing authority "not be precluded from considering, as a mitigating factor, any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604 (emphasis in original); see also Eddings v. Oklahoma, 455 U.S. 104 (1982); Bell v. Ohio, 438 U.S. 632 (1978).

A state's application of the death penalty, then, must tread a fine line to pass constitutional muster. See Lockett v. Ohio, 438 U.S. at 628-29 (Rehnquist, J., dissenting). Although a trial court must guide the jury's exercise of discretion, it cannot restrict the jury's consideration of the evidence. Statutes ensuring that "the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information," Gregg v. Georgia, 428 U.S. at 195, meet this standard. See, e.g., id. at 153; Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

In Georgia capital cases, the "jury is authorized to consider any ... appropriate aggravating or mitigating circumstance." Gregg, 428 U.S. at 197; see Ga. Code Ann. § 17-10-30 (1982). For this reason, this court found that Georgia's sentencing scheme was constitutional on its face. Yet Georgia's practice of perfunctorily mentioning the existence of mitigating evidence, rather than explaining its role and guiding the jury, renders the statute unconstitutional, in violation of "the defendant's procedural right to the jury instructions necessary to give effect to the substantive Lockett requirements." Hertz & Weisberg, supra, at 314.

The validity of Georgia's limited reading of this Court's recent decisions ultimately depends on whether the instructions given would inform a reasonable juror of the law's requirements.

Sandstrom v. Montana, 442 U.S. 510 (1979). The need for special assurances of reliability in death-penalty cases[1] casts doubt on whether Georgia's superficial instructions meet this standard and apprise a juror of his ability to consider mitigating evidence.[2] Merely admitting evidence in mitigation is constitutionally insufficient; such evidence is of slight value unless the jury understands the role and significance that such evidence may play. See Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978). The jury must be told, in other words, more than merely to consider mitigating circumstances; the role of such evidence must be explained in some fashion. Absent sufficient guidance, the guarantees of Gregg and Lockett ring hollow.

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[1]Consequently, petitioner would not extend his argument beyond sentencing instructions in death-penalty cases. As this Court has often observed the death penalty invokes concerns that are qualitatively different from those in more conventional criminal cases:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. at 395.

[2]Thus petitioner recognizes that this case does not fit squarely within the confines of Lockett v. Ohio, 428 U.S. 586 (1978). In Lockett, Ohio's statutory sentencing scheme actually barred admission of certain mitigating evidence. This case invites a logical extension of the sound principles articulated in Lockett. Cf. Spivey v. Zant, 661 F.2d 464, 470 (5th Cir. 1981), cert. denied, 102 S.Ct. 3495 (1982) (while Lockett inapplicable, court extends its principles "to require clear instructions on mitigation and the option to recommend against death").

B. Conflict on this issue between the Georgia Supreme Court and the United States Courts of Appeals for the Fifth and Eleventh Circuits fosters uncertainty and duplication.

The Georgia Supreme Court has narrowly interpreted the requirement of instructing the jury on "mitigating circumstances." In Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039 (1980), the trial judge told the jury at sentencing that it was authorized to consider all evidence heard in both the guilt-innocence and sentencing phases of the trial in determining an appropriate penalty. In his instructions, the trial judge failed to mention the words "mitigating circumstances." The Georgia Supreme Court held the charge constitutionally adequate. 421 Ga. at 479, 246 S.E.2d at 291. The court reasoned that because the Georgia statute, Ga. Code Ann. § 17-10-30 (1982), did not define "mitigating circumstances" the jury could consider anything as mitigating "without limitation or definition." 421 Ga. at 479, 246 S.E.2d at 291. Thus, according to the Georgia court in Spivey, a trial court need not mention, define, or explain mitigating circumstances to the jury, or guide its use of this evidence.

In Smith v. State, 249 Ga. 228, 290 S.E.2d 43, cert. denied, ____ U.S. ____, 103 S.Ct. 182 (1982), the court held without discussing Spivey that the trial court's failure to define the term "mitigating" was constitutionally adequate. The court concluded that "[m]itigation is a word of common meaning and understanding, it is not error to fail to define it." Id. at 299, 290 S.E.2d at 45.

In effect, the Georgia Supreme Court has endorsed its lower courts' policy of providing no guidance to the jury. The Georgia trial courts fail to both "[t]ell the jury what a mitigating circumstance is" and "what its [evidence in mitigation] function is in the jury's sentencing deliberations." Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1982).

The Courts of Appeals for the Fifth and Eleventh Circuits have opted for an approach drastically at odds with that of the Georgia Supreme Court, fostering a cycle in which the state Supreme Court summarily affirms the sentence and the federal courts then vacate on writ of habeus corpus. In Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978), the court vacated a Georgia death sentence because the

> constitutional requirement to allow consideration of mitigating circumstances would have no importance, of course, if the sentencing jury is unaware of what it may consider in reaching its decision. We read Lockett and Bell, then, to mandate that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death.

The Fifth and Eleventh Circuits have reaffirmed the Chenault duty on numerous occasions. See, e.g., Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (Florida); Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982) (Texas); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982) (Georgia); Georgia v. Watkins, 681 F.2d 1067 (5th Cir. 1982) (Georgia); Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981) (Georgia), cert. denied, ____ U.S. ____, 103 S.Ct. 182 (1982); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981) (Texas); cf. id. at 1375 (emphasis added) ("The fatal flaw in Lockett was not the exclusion of evidence relating to non-statutory mitigating factors, but the limitation on the sentencer's consideration of the evidence.")

Recent decisions highlight the need to resolve this conflict. After the Georgia Supreme Court affirmed in Spivey, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039 (1980), the Court of Appeals for the Fifth Circuit later vacated the sentence. See Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981). Although the court of appeals made clear its intent to vacate any sentence lacking adequate instructions on mitigation, the Georgia state courts have failed to heed this warning, promoting uncertainty and unnecessary litigation. Recently, the Eleventh

Circuit considered an instruction similar to the one in this case. In Goodwin v. Balkcom, the jury was told to consider "all the facts and circumstances" and any "evidence in extenuation, mitigation, or aggravation." 684 F.2d at 799. In vacating the sentence, the court concluded:

> In this circuit, then, the state of the law is well settled. Capital sentencing instructions which do not clearly guide a jury in its understanding of mitigating circumstances and their purpose . . . violate the eighth and fourteenth amendments.

Id. at 802.

As in Goodwin, the court of appeals is likely to vacate the sentences in this case on writ of habeus corpus. Only this Court's exercise of its power of review can prevent the disharmony and protracted litigation that this conflict has engendered.

C. Georgia's courts' interpretation of its sentencing scheme is inconsistent with the approach taken by 33 of 35 states.

Georgia's approach of offering the jury no guidance on mitigating circumstances is nearly universally repudiated by other states.[3] Of the 35 states with death-penalty statutes, the most common approach provides the sentencing jury with a non-exclusive list of mitigating circumstances.[4] Another approach, one specifically mentioned in Gregg v. Georgia, 428 U.S. at 193, offers the sentencing jury a non-exclusive list of mitigating

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[3]Only South Dakota and Georgia neither provide a non-exclusive list of mitigating circumstances nor explain to the jury the functions of mitigating circumstances. Ga. Code Ann. § 17-10-30 (1982); S.D. Codified Laws Ann. § 23A-27A-1 (Supp. 1982) Three states--Oklahoma, Delaware, Idaho--provide for weighing but do not offer a non-exclusive list of mitigating circumstances. See Del. Code Ann. 11 :4209 (1979 Repl. vd.); Idaho Code 19-2515 (1979); Okla. Stat. Ann. 21-701.11 (West 1982).

[4]Twenty-eight states have adopted this approach. See Appendix E.

circumstances and directs the jury to weigh aggravating and mitigating circumstances against each other.[5] See Model Penal Code § 201.6 comment 3 (Tent. Draft No. 9 1959). As nearly every other state with a death-penalty statute has recognized, some such guidance to the jury is necessary to ensure reliable sentences.

III.

THE GROSS MISCONDUCT OF PETITIONER'S TRIAL COUNSEL, IN EFFECT PLEADING HIS CLIENT GUILTY DURING CLOSING ARGUMENTS (NOTWITHSTANDING PETITIONER'S TRIAL TESTIMONY WHICH, IF BELIEVED, WOULD HAVE REQUIRED CONVICTION FOR NONCAPITAL OFFENSES, AND NOTWITHSTANDING INSTRUCTIONS TO THE JURY BY THE TRIAL COURT, BASED ON PETITIONER'S TESTIMONY, AUTHORIZING FINDINGS OF VOLUNTARY MANSLAUGHTER AND SELF-DEFENSE) CONSTITUTES A PLAIN ERROR THAT RENDERS PETITIONER'S TRIAL AS A WHOLE FUNDAMENTALLY UNFAIR.

On the day of his arrest, petitioner gave a taped statement to police officers in which he admitted firing his handgun two times, but insisted that he lacked any intent to injure. Petitioner plead not guilty to two counts of murder and one count of armed robbery at his arraignment. At trial, petitioner gave testimony consistent with his pretrial statement; he admitted firing his gun at two men, but denied having intent to kill or to inflict great bodily injury. Instead, petitioner reiterated that he feared for his own safety and fired the shots to protect himself. Despite his client's repeated assertion that he lacked intent to kill or injure, and despite jury charges on the lesser offenses of voluntary manslaughter and self-defense, petitioner's trial counsel instructed the jurors during his closing argument that if they accepted their responsibility as jurors, they should find petitioner guilty of both counts of murder and not guilty of armed robbery.

This concession was consistent with comments made by counsel

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[5]Thirteen states have adopted this approach. See Appendix E.

during voir dire and his opening statement. During voir dire, counsel referred to the victims as people murdered by the defendant. Similarly, during his opening statement counsel referred to the victims as men defendant had killed. The jury returned a verdict of guilty on each charge after less than two hours of deliberation.

Under this Court's Rule 34(1)(a), "the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." Although the Georgia Supreme Court did not explicitly consider whether petitioner's trial counsel rendered effective assistance,[6] under Rule 34(1)(a), this Court may review the record independently and take notice of the patently ineffective assistance rendered by petitioner's counsel. See Vachon v. New Hampshire, 414 U.S. 478 (1974) (Where this Court conducted an independent examination of the trial record and determined that there was a complete absence of evidence as to a crucial element of the offense charged. The due process claim sustained by the Court had not been raised on appeal in the state supreme court.) The ineffective assistance plainly revealed by the trial record in this case constitutes the type of fundamental constitutional

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[6] Under the Georgia Unified Appeal Procedure, the trial judge in a capital case is required to transmit a report in the form of a questionnaire to the Supreme Court along with the entire transcript of all proceedings below within thirty days from entry of an order denying a motion for a new trial. Ga. Code § 27-2537 (1983). Included in this report from the trial court is a summary of defense counsel's prior experience and the trial judge's notation of the defendant's response when asked whether representation of counsel has been satisfactory. Thus, the Georgia Supreme Court must implicitly take notice of whether trial counsel has performed adequately when it reviews the entire record on appeal. This is a case where the state court could not have reached its judgment without tacitly, if not expressly, deciding this federal issue of effective assistance of counsel. Therefore, this Court could take jurisdiction on this issue solely on the basis of 28 U.S.C. § 1257 without resort to Rule 34(1)(a). See Schlemmer v. Buffalo, Rochester & Pittsburgh Railway Co., 220 U.S. 590 (1911).

error that the Court should not ignore.[7] Cf. Mahler v. Elby, 264 U.S. 134, 145 (1924) ("We may under our rules notice a plain and serious error though unassigned. The character of the defect is such that we cannot relieve ourselves from its consideration.") Considerations of judicial economy also support review of this issue on petition for certiorari. No conceivable explanation could be revealed in a hearing on a habeus corpus petition that would vindicate the decision of petitioner's counsel plainly revealed by the record to concede his client's guilt during summation.

Petitioner's version of the events of June 22, 1981, in both his pre-trial statement and his trial testimony, suggested at least one possible defense to the two counts of malice murder with which he was charged under Georgia law. The defense of voluntary manslaughter was consistent with petitioner's version of the killings. Under Georgia law, a killing that would otherwise be murder justifies only a verdict of voluntary manslaughter if the perpetrator acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person.

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[7] There are an extraordinary number of other instances of ineffective assistance of counsel in this case. During pre-trial proceedings, counsel utterly failed to substantiate a motion for change of venue based on publicity when such evidence was apparently readily available. During the sentencing phase of the trial, counsel's examination of witnesses offering mitigating evidence was painfully inept. The Georgia Supreme Court was required to remind counsel several times that an appellate brief was due and finally warned counsel of possible sanctions it would impose for failure to file the brief. That brief when eventually filed listed but utterly failed to address in any fashion several grounds of error. More significantly, rather than even perfunctorily analyzing the issues, the brief appears to merely copy verbatim substantial portions of counsel's oral argument transcribed in the trial record. Despite this abundance of evidence reflecting the ineffective assistance of counsel, this Petition deals only with one aspect of counsel's performance at trial. Counsel's assistance at trial by itself was so patently deficient as to constitute a violation of due process plainly visible from the record.

Despite the availability of this partial defense to the malice murder charges (along with the complete defense of self-defense), petitioner's plea of not guilty to all charges against him, and a jury instruction given by the trial judge on voluntary manslaughter and self-defense, petitioner's trial counsel told the jury during his summation to find petitioner guilty of both counts of murder and to acquit him of one count of armed robbery.

In effect, petitioner's trial counsel entered a guilty plea on behalf of his client without his client's consent. This deprived petitioner of his due process right to a fair trial and his sixth amendment rights to the effective assistance of counsel and to a trial by jury. In Brookhart v. Janis, 384 U.S. 1 (1966), trial counsel agreed to let his client's guilt be established in a prima facie trial devoid of cross-examination even though the defendant had never plead guilty. This Court held that although under ordinary circumstances counsel can preclude the accused from asserting certain constitutional claims as a matter of trial strategy, there is no support for the "contention that counsel for defendant can override his client's desire expressed in open court to plead not guilty and enter in the name of his client another plea . . . which would shut off the defendant's constitutional right to confront and cross-examine the witnesses against him." Id. at 7-8. Undeniably, after Henry v. Mississippi, 379 U.S. 443 (1965), counsel may make some strategic decisions that involve waiver of constitutional rights without consulting the accused. The right to plead not guilty, however, is not among the constitutional rights that may be waived without consultation. "Where an inherently personal right of fundamental importance is involved," the waiver must be made personally by the accused to be considered effective. Winters v. Cook, 489 F.2d 174, 189 (5th Cir. 1973). Such personal fundamental rights include the right to plead guilty, the right to waive a trial by jury, the

right to waive appellate review, and the right to testify personally. Id. at 179.

The American Bar Association Standards for the Defense Function also recognize that the accused is solely responsible for determining his plea. Section 4-5.2(a) provides: "Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: 1) what plea to enter, 2) whether to waive jury trial, and 3) whether to testify in his own behalf." ABA, Standards for Criminal Justice § 4-5.2 (2d ed. 1980). Petitioner's counsel wrested the first two of these decisions from his client and then plead him guilty to the jury despite his earlier plea of not guilty at arraignment. The ABA also provides standards to guide lawyers handling pleas of guilty: "Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant." ABA, Standards for Criminal Justice, supra, § 14-3.2(a). In this case, counsel's position was fundamentally at odds with petitioner's in-court testimony, his out-of-court statement, and his plea of not guilty at the arraignment.

In Hudson v. Alabama, 493 F.2d 171 (5th Cir. 1974), following the defendant's plea of not guilty at his arraignment, his trial counsel read the jury a sentencing agreement previously arranged with the state solicitor. The jury left the courtroom without listening to any evidence and returned shortly thereafter with a guilty verdict recommending that the sentence set forth in the agreement be imposed. The Fifth Circuit held that such assistance as that rendered by defendant's counsel clearly was not reasonably effective. Id. at 173.

Under any reasonable standard of effective assistance

guaranteed by the sixth amendment, the assistance rendered by petitioner's trial counsel was ineffective. Moreover, this ineffective assistance severely prejudiced petitioner. Counsel's error was more severe than the unnecessary elicitation of an inflammatory statement, Adams v. Balkcom, 688 F.2d 734, 745 (11th Cir. 1982), more prejudicial than a decision whether to question witnesses, United States v. Hughes, 635 F.2d 449, 452 (5th Cir. 1981), and more prejudicial than a failure to object to improper jury argument by the prosecutor. Fulford v. Maggio, 692 F.2d 354 (5th Cir. 1982). In short, the action of petitioner's trial counsel cannot be excused as a valid trial tactic. Even if the concession of petitioner's guilt made by counsel to the jury is considered a defense strategy, it was so ill-chosen that it rendered counsel's overall representation constitutionally defective. Adams v. Balkcom, 688 F.2d at 738; see also Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied 456 U.S. 949 (1982). A guilty verdict was inevitable following defense counsel's closing argument; no greater prejudice may result from an error by trial counsel. Thus, the assistance petitioner received was in clear derogation of his constitutional right to a fair trial in which he receives adequate representation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Nelson E. Roth, Esq.
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Ithaca, New York 14853
(607) 256-3408

May 26, 1983

82-6852

Office-Supreme Court, U.S.
FILED
MAY 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIE JAMES WILSON,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to Supreme Court of the State of Georgia without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully submitted,

Nelson E. Roth
The Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853

ATTORNEY([redacted]) FOR PETITIONER

RETAINER OF COUNSEL AGREEMENT

I, WILLIE JAMES WILSON, hereby retain Nelson Roth, a member of the Bar of the State of New York and a member of the faculty of the Cornell Law School in Ithaca, New York, to represent me in the filing of a Petition for Writ of Certiorari in the Supreme Court of the United States, and in any other legal proceedings, if necessary, relating to the sentence of death imposed upon me in 1982, in the Superior Court of Pierce County, Georgia, for the crime of murder. I give him permission to associate with himself in this effort such other attorneys as he in his best judgment sees fit.

It is understood between me and Nelson Roth that the services which he and any other associated counsel render are free and without charge.

Willie James Wilson Jr.

WILLIE JAMES WILSON
EF-143520
G. D. and C. C.
P. O. Box 3877
Jackson, Georgia 30233

STATE OF GEORGIA
COUNTY OF BUTTS

The aforesaid Agreement of WILLIE JAMES WILSON was subscribed to and sworn to before me, this the 29 day of March, 1983.

Aaron Mcgowan

Notary Public

My Commission expires:

9-20-83

No. 82-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIE JAMES WILSON,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

I, WILLIE JAMES WILSON, declare that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to relief.

1. Are your presently employed? Yes____ No ✓

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

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   b. If the answer is "no," state the date of last employment and the amount of salary and wages per month which you received.

   last employment U.S. Army, last date of employment was 1981, salary per month $591. Box 2/11 Zip Code Ft. Stewart Ga. 31314

2. Have you received within the last twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes___ No✓
b. Rent payments, interest or dividends? Yes___ No✓
c. Pensions, annuities or life insurance payments? Yes___ No✓
d. Gifts or inheritances? Yes___ No✓
e. Any other sources? Yes___ No✓

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____

3. Do you own cash, or do you have money in checking or savings account?

Yes ___ No ✓ (Include any funds in prison accounts.) If the answer is "yes," state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ___ No ✓
If the answer if "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Willie James Wilson

WILLIE JAMES WILSON

STATE OF GEORGIA
COUNTY OF BUTTS

WILLIE JAMES WILSON, being first duly sworn under oath, presents that he had read and subscribed to the above and states that the information therein is true and correct.

Subscribed to and sworn to before me,
this the 21 day of March, 1983.

Notary Public

My Commission expires:
4-10-83

CERTIFICATE

I hereby certify that the petitioner herein, _____, has the sum of $ _____ on account to his credit at the Georgia Diagnostic and Classification Center where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said Georgia Diagnostic and Classification Center: _____

_____

_____

_____

_____

Authorized Officer of Institution